Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1626

LAS VEGAS SUN, INC.,

Petitioner.

vs.

SUMMA CORPORATION, dba CASTAWAYS CASINO, FRONTIER HOTEL, and DESERT INN HOTEL; HOTEL PROPERTIES, INC., dba LANDMARK HOTEL; HUGHES TELEVISION NETWORK, INC., dba SANDS HOTEL; FIRST NATIONAL BANK OF NEVADA, dba SILVER SLIPPER; FRANK W. GAY; and CHESTER DAVIS.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CORPORATE RESPONDENTS' BRIEF IN OPPOSITION.

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Respondents.

CORPORATE RESPONDENTS' BRIEF IN OPPOSITION.

The Corporate respondents, Summa Corporation, dba Castaways Casino, Frontier Hotel, and Desert Inn Hotel; Hotel Properties, Inc., dba Landmark Hotel; Hughes Television Network, Inc., dba Sands Hotel; and First National Bank of Nevada, dba Silver Slipper, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 610 F.2d 614.

Statement of the Case.

Petitioner styled this action as an antitrust treble-damage action by making allegations of conspiracy to restrain trade in violation of section one of the Sherman Act (15 U.S.C. § 1).[1] Following a full trial, the District Court entered judgment for the defendants, basing its decision on several alternative grounds. The decision was affirmed in its entirety by the United States Court of Appeals for the Ninth Circuit. Petitioner now seeks a writ of certiorari to again review determinations of both fact and law that have been properly decided twice before.

Petitioner is the Las Vegas Sun, Inc. (the "Sun"), which owns and publishes the *Las Vegas Sun*, a newspaper of general circulation in the area of Las Vegas, Nevada. At the time the District Court rendered its opinion, the most recent audit established that the *Las Vegas Sun's* average daily circulation was 38,447 while that of its chief competitor, the *Las Vegas Review-Journal*, was 67,921.

All of the corporate respondents were owned and controlled by the late Howard R. Hughes.[2] The corporate respondents own resort hotels and casinos (the "Hughes Resorts") which are generally engaged in providing entertainment and leisure activities in the city of Las Vegas. The Hughes Resorts advertise in a variety of media, including newspapers. Their share of the *Las Vegas Sun's* total display advertising during the year 1975 was less than

[1]At the trial and on appeal the petitioner also asserted claims under Section 8 of the Clayton Act (15 U.S.C. § 19) and the common law of the State of Nevada. However, these claims have not been advanced in the petition.

[2]The sole exception is the First National Bank of Nevada which was sued in its capacity as co-special administrator of Howard Hughes' estate. First National Bank is doing business as The Silver Slipper, which Mr. Hughes held as a sole proprietor before his death.

1.8%. (Pet. App. B at 5, Finding No. 14.)[3] Respondents Frank W. Gay and Chester Davis were, at all times relevant to this action, respectively, the chief executive officer and the general counsel of respondent Summa Corporation.

Summa Corporation directed and provided management services for the various resorts through its Recreation Group. One person was assigned to manage all the operations, and management expenses were allocated among the various casinos and hotels. (Ex. DS.) The District Court found that internally the resorts were operated by Summa as divisions and that they held themselves out to the public as a single business known as the "Hughes Resort Hotels" and the "Hughes Hotels and Casinos." (Pet. App. B at 4, Finding No. 6.) Although they were in competition with each other in the sense that they were all engaged in a similar business, the District Court found that they functioned as a single economic entity and did not compete in fact. (Pet. App. B at 5, Finding No. 9.) That finding was amply supported by substantial evidence, including the fact that the corporate respondents regularly advertised themselves collectively as the "Hughes Resort Hotels" (Ex. DK) or one of the "Hughes Hotels." (Ex. DM.) Significantly, even the Sun treated the corporate respondents as a group for purposes of billing them for their advertising purchases. (Ex. BI.)

In May of 1967, Summa (then known as the Hughes Tool Company) and the Sun entered into an agreement whereby Summa advanced $500,000 to the Sun for prepaid advertising in the *Las Vegas Sun*. Summa was permitted to designate which of its businesses, including the Hughes Resorts, would be entitled to draw on the account, and irrespective of which hotel or hotels were the subject of a

[3]"Pet." refers to the petition for writ of certiorari; "Pet. App." refers to the appendices thereto; and "Ex." refers to trial exhibits.

particular advertisement, the Sun charged the Summa account.

The District Court found that the Sun got the $500,000 through the assistance of Robert Maheu, who at the time was head of Hughes' Nevada operations. (Pet. App. B at 6, Finding No. 16.) Over the next several years, Mr. Maheu arranged for Summa to loan, on extremely favorable terms, a total of approximately $11,373,064 to Hank Greenspun, the founder and controlling owner of the Sun. The day after Greenspun got the single largest payment, he "loaned" $150,000 to Maheu. No payment of principal or interest has ever been made. (Pet. App. B at 7, Finding No. 17.) Hughes fired Maheu in December, 1970, and immediately thereafter the Sun began to attack Hughes and his businesses in its editorials. (Pet. App. B at 7, Finding No. 18.)

During the latter part of 1974, Summa analyzed the economic efficiency and business justification for advertising in various media, and in that regard, commissioned and completed a study to review the relative cost-effectiveness of advertising placed in the *Las Vegas Sun* and its competitor, the *Las Vegas Review-Journal*. The study included an independent marketing survey, comparison of advertising rates, and consideration of the desires of the entertainers appearing at the various resorts. (Pet. App. B at 7, Finding No. 19.) Robert Bennett, the head of Summa's Public Relations Department, determined that the quality of the *Las Vegas Sun's* printing and photographic reproduction was inferior. Moreover, it was learned that the cost of reaching 1,000 subscribers by advertising in the *Las Vegas Sun* was nearly twice that of the *Review-Journal*. Taking overlapping readership into account, it was nearly three times as expensive to advertise in the *Las Vegas Sun*. (Pet. App. B at 7-8, Finding No. 20.) The petitioner's own records established that over 200 businesses had reached the same conclusion; it was simply not economically wise to advertise in both newspapers and the *Review-Journal* was a better value. (Pet. App. B at 8, Finding No. 22.) Although there were compelling business reasons for terminating its advertising in the *Las Vegas Sun*, Summa decided to defer the decision until the prepaid account was substantially exhausted.

Notwithstanding the *Las Vegas Sun's* already high rates, on April 1, 1976 it again raised its prices. Then, on April 12, 1976, the *Las Vegas Sun* printed an article implying that Summa officers were guilty of forgery and other criminal misconduct. At that time, the prepaid advertising had been reduced to what the District Court found to be "a trivial amount" (Pet. App. B at 8, Finding No. 24), and Mr. Bennett decided to bring to a head the issue of whether to continue Summa's policy of advertising in both Las Vegas newspapers. After contacting respondent Gay to discuss the matter, he was told to use his own judgment, but to consider only the cost-effectiveness of the advertising. (Pet. App. B at 8, Finding No. 24.) After deliberation, Bennett decided to terminate all future advertising by the corporate respondents in the *Las Vegas Sun* and he directed the appropriate people to implement his decision. The District Court found that, in reaching his judgment, Bennett acted solely on behalf of Summa, for the purpose of advancing its legitimate business interests and without any injurious intent. (Pet. App. B at 9-10, Findings Nos. 27-29.) As the Ninth Circuit stressed, "[i]t is undisputed that Bennett made a unilateral decision on Summa's behalf to terminate all advertising in the *Las Vegas Sun*, which decision was forthwith implemented by personnel at each of the six hotel-casinos." (Pet. App. A at 8.)

Despite petitioner's intimation that withdrawal of advertising would cause grave economic consequences for the

Sun, the evidence at trial established that, following cancellation of the advertising, the *Las Vegas Sun* flourished. Both its revenue and the sale of its advertising space increased in all the months after April, 1976.

Although the findings made by the District Court and reviewed and relied on by the Ninth Circuit are thoroughly supported by the evidence, the petitioner apparently contends, without demonstrating how, that they are "clearly erroneous." In fact, the bulk of the petition is a transparent attempt to reargue the District Court's fully supported findings of fact, such as the findings that the Hughes Resorts were not competitors (Pet. App. B at 5, Finding No. 13), that the decision to cancel the advertising was a unilateral one and not the product of a contract, combination or conspiracy (Pet. App. B at 9, Finding No. 26), and that there was no anticompetitive purpose or effect in the decision to terminate the advertising. (Pet. App. B at 10, Finding No. 29.)

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

CERTIORARI IS UNWARRANTED ON THE ISSUE OF THE CAPACITY OF SEPARATE CORPORATIONS TO CONSPIRE WITHIN THE MEANING OF SECTION ONE OF THE SHERMAN ACT.

The first question petitioner contends is presented by this case involves the capacity of separate corporations to conspire within the meaning of section one of the Sherman Act. The question arises because the statutory requirement of a "contract, combination or conspiracy" necessarily contemplates a plurality of actors. However, contrary to petitioner's argument, the decisions of this Court do not hold that no "further inquiry beyond separate incorporation [is required] to determine the conspiratorial capacity of separate entities." (Pet. at 18.) In this case, further inquiry established that Summa operated the Hughes Resorts as part of a single business enterprise. (Pet. App. B at 3-5, Findings Nos. 5, 6, and 9.) Moreover, the facts of this case do not provide a proper vehicle for the Court to consider the issue in any event, because the decision of Summa's Director of Public Relations to cancel the advertising was an entirely unilateral one, made without consultation among the alleged conspirators.

A. The Decision of the Court Below Is Consistent With Prior Decisions of This Court.

In support of its contention that the mere fact of separate incorporation necessarily renders two businesses capable of conspiring under the antitrust laws, the petitioner cites four decisions of this Court, which state that common ownership and control of separate corporations does not necessarily

serve to liberate them from the impact of the antitrust laws.[4] However, unlike the lower federal courts throughout the country, petitioner reads the language contained in those opinions much too broadly. While it is clear that the mere fact of common ownership does not render separate corporations incapable of conspiring, *it does not follow that they are therefore necessarily capable of conspiracy*. Rather, the inquiry becomes a factual one, as this Court expressly acknowledged in *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19 (1962). In *Sunkist* this Court looked at substance, not form, and determined that three legally separate entities lacked the capacity to conspire within the meaning of the antitrust laws. The opinion stressed that the various entities involved were in practical effect one organization "even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect. . . ." *Id.* at 29. *Sunkist* unequivocally repudiated the unreasonably broad theory of intra-enterprise conspiracy petitioners attribute to decisions of this Court.

The Ninth Circuit was well aware of the authorities relied on by petitioner in support of its argument. (Pet. App. A at 6.) *See also, Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied* 433 U.S. 910 (1977). However, it recognized that "the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." (Pet. App. A at 6.) As the Ninth Circuit put it, the fact question is whether separate corporate entities are "sufficiently independent of

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[4] *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Kiefer-Stewart v. Seagram*, 340 U.S. 211, 215 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

each other for their concerted action to raise antitrust concerns." (Pet. App. A at 6.) In addition, because the District Court made fully supported factual findings that the Hughes hotels and casinos did not hold themselves out as competitors, the theoretical underpinnings of prior decisions of this Court, which held that certain commonly owned corporations could conspire, are not involved.

By twisting this Court's statement that common ownership does not liberate separate corporations from the impact of the antitrust laws into an arbitrary rule that the mere formality of separate incorporation renders affiliated corporations *per se* capable of conspiracy, petitioner has attempted to create uncertainty where none exists. Lower courts have experienced no difficulty in comprehending the actual scope of this Court's pronouncements, and they have elaborated a principled body of law for determining the circumstances under which commonly owned corporations may be capable of conspiring. *See, e.g., Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied* — U.S. — (1980); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied* 433 U.S. 910 (1977); *Ark Dental Supply Company v. Cavitron Corp.*, 461 F.2d 1093 (3rd Cir. 1972); *Far Eastern Coconut Co. v. Sunripe Coconut Corp.*, 1979-2 Trade Cases ¶ 62,878 (E.D.N.Y. 1979); *REA Express, Inc. v. Alabama Great Southern Railroad Co.*, 1976-2 Trade Cases ¶ 61,174 (S.D.N.Y. 1976); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635 (S.D.N.Y. 1976); *Call Carl, Inc. v. B.P. Oil Corp.*, 403 F. Supp. 568 (D. Md. 1975); *Chastain v. American Telephone & Telegraph Co.*, 401 F. Supp. 151 (D.D.C. 1975); *In re Penn Central Securities Litigation*, 367 F. Supp. 1158 (E.D. Pa. 1973); *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F. Supp. 868 (S.D.N.Y.

1973); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam* 451 F.2d 593 (2d Cir. 1971).

B. The Issue of the Capacity of Separate Corporations to Conspire Is Not Raised by the Facts of This Case.

The decision to terminate the corporate respondents' advertising in the *Las Vegas Sun* was the unilateral act of Robert Bennett, respondent Summa's Director of Public Relations. As the Ninth Circuit pointed out:

> "It is undisputed in the instant case that Bennett made a unilateral decision on Summa's behalf to terminate all advertising in the *Las Vegas Sun*, which decision was forthwith implemented by personnel at each of the six hotel-casinos."
>
> Pet. App. A at 8.

Thus, the undisputed facts establish that, regardless of whether the corporate respondents theoretically had the capacity to conspire, no agreement or understanding was ever reached. As the Ninth Circuit held, it is "irrelevant that Summa's agents, the managers of the six casinos, actually implemented the decision." (Pet. App. A at 9.) *See also Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-56 n. 8 (9th Cir. 1979). Inasmuch as the court below found that Mr. Bennett's decision to cancel the advertising was a unilateral one, reached without consultation or discussion among the alleged conspirators, this record simply does not present the question of when affiliated but separately incorporated businesses can conspire under the antitrust laws. Rather, the undisputed findings establish that no agreement was ever reached and that the alleged conspiracy did not take place.

II.

THE CONDUCT INVOLVED IN THIS ACTION IS NOT ACTIVITY WHICH HAS EVER BEEN HELD TO BE PER SE UNLAWFUL AND THE OPINION BELOW IS ENTIRELY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Contrary to petitioner's assertion, this case does not involve a classic boycott of the type held to be a *per se* violation of the Sherman Act. (Pet. at 19.) The "classic boycott" has been defined by one noted commentator as "a concerted refusal aimed at depriving competitors of some needed resource, and thus making it harder for them to compete." Sullivan, The Law of Antitrust, p. 256 (1977). The unusual facts of this case simply do not fit the mold of a boycott, much less one violative of the Sherman Act. As petitioner itself recognizes, this is not a case where *competitors* are involved. (Pet. at 20.) The Sun was not a competitor of the respondents; it did not even deal in the same product or service. Invariably, in the decisions holding boycotts illegal *per se*, at least one member of the conspiracy was a competitor of the victim of the boycott. Moreover, the primary goal of a boycott is to destroy competition by coercion, yet, as the findings below establish, the purpose of the decision to cancel advertising was to accomplish a legitimate business objective. (Pet. App. B at 9-10, Findings Nos. 27-29.)

Inasmuch as the findings below establish that the cancellation of the advertising was justified by business considerations, the petitioner cannot rely on cases applying the *per se* rule to refusals to deal aimed at driving a competitor out of business. This Court's statements on the theory for applying the *per se* rule in the classic boycott context have uniformly been based on the concept that such activities normally have as their purpose the suppression of compe-

tition. *See, e.g., Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 467 (1941) (applying the *per se* rule where "the aim of petitioners' combination was the intentional destruction" of competition); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Thus, a concerted refusal to deal may be a *per se* violation *absent any justification. Silver v. New York Stock Exchange*, 373 U.S. 341, 348-49 (1963).

The lower courts have had no difficulty in comprehending that the *per se* rule applies only in those classic boycott situations where there exists a purpose of intent to injure a competitor. *See, e.g., Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 132-33 (2d Cir.), *cert. denied* 439 U.S. 946 (1978), *Hatley v. American Quarter Horse Ass'n.*, 552 F.2d 646, 652-53 (5th Cir. 1977); *Mackey v. National Football League*, 543 F.2d 606, 618-20 (8th Cir. 1976), *cert. dismissed* 434 U.S. 801 (1977); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors Ltd.*, 416 F.2d 71, 76-78 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970). The amply supported findings below refute any suggestion of such motives in this case.

Moreover, the supposed injury alleged by the Sun is simply not supported by the facts. At most, the effect was *de minimis*. Prior to cancellation, the Hughes hotels and casinos accounted for only 1.8% of the *Las Vegas Sun's* overall advertising space. Following cancellation, the newspaper's advertising sales and revenue steadily increased. (Pet. App. B at 10, Finding No. 30.) It is an established principle that a concerted refusal to deal, in the absence of an anticompetitive motive or a significant anticompetitive effect, does not transgress the antitrust laws. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied* 433 U.S. 910 (1977).

This case is simply not an antitrust case, despite petitioner's attempt to style it as such. Summa's decision to discontinue advertising in the *Las Vegas Sun*, which was entirely unilateral and designed to accomplish a legitimate business objective, did not affect a competitor or competition. Indeed, the Sun was not involved in a business which was competitive in any sense with the Hughes Resorts. Consequently, this case does not present an appropriate vehicle for this Court to consider the applicability of the *per se* rule to refusals to deal. Moreover, a necessary predicate to finding a violation of section one—the existence of joint activity—is not present in this case. Consequently, this Court would not reach the question of the application of the *per se* rule to the conduct herein in any event.

Conclusion.

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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